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 UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 WESTERN DIVISION

UNITED STATES OF AMERICA,) NO. CR 05-316-DSF
)
Plaintiff,) GOVERNMENT'S RESPONSE TO MOTION OF
) DEFENDANT RICHARD B. LEONARD TO
v.) RECONSIDER THE COURT'S RESTITUTION
) ORDER AND TO CORRECT SENTENCE
JOHN S. LIPTON, et al.,)
) Date:
Defendants.) Time:
)
)

COMES NOW the United States of America, by and through its
 counsel of record, Trial Attorneys Lori A. Hendrickson, Ellen M.
 Quattrucci, and Danny N. Roetzel, Department of Justice, Tax
 Division, and files its response in opposition to the Motion of
 defendant RICHARD B. LEONARD to Reconsider the Court's
 Restitution Order and to Correct Sentence.

1 The government's position is based on the attached
2 memorandum of points and authorities; the record and file in this
3 case; and any additional evidence and argument that the Court may
4 receive prior to or at any hearing on the motion.

5 Dated: May 12, 2010

Respectfully Submitted,

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8 Acting Assistant Attorney General

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND AND SUMMARY ARGUMENT

On December 1, 2008, defendant RICHARD B. LEONARD ("LEONARD") pleaded guilty to Count 68 of the Indictment, which charges a conspiracy to defraud the United States in violation of 18 U.S.C. § 371, and a one-count information charging attempted tax evasion in violation of 26 U.S.C. § 7201. In his Plea Agreement, defendant LEONARD agreed to make full restitution for the losses caused by his activities, but did not agree to a specific amount of restitution. Plea Agreement ¶ 9 (Docket Entry 681). On February 23, 2009, the Court sentenced defendant LEONARD to "time served," to be followed by three years supervised release, but deferred determination of any restitution to be paid by defendant LEONARD pursuant to 18 U.S.C. § 3664(d)(5). On April 26, 2010, following a restitution hearing held on January 11, 2010, during which evidence was taken from two agents of the Internal Revenue Service, and after receiving extensive briefing from the parties, the Court entered an order ("the Restitution Order") directing defendant LEONARD to pay restitution in the amount of \$2,915,427.16.

Defendant LEONARD now seeks reconsideration of the Restitution Order pursuant to Federal Rule of Criminal Procedure 35(a), which permits a court to correct a sentence that resulted from arithmetical, technical, or other clear error.¹ The "error"

¹Defendant LEONARD also filed a notice of appeal regarding the Restitution Order. (Docket Entry 966.) Defendant LEONARD's

1 defendant LEONARD claims the Court should correct is that "the
2 government did not prove that it had done its best to discover,
3 and exclude, all non-income items from the reconstituted [sic]
4 income." Def's Mot. at 2. Defendant LEONARD's claim of error is
5 nothing more than an attempt to re-litigate an issue that even
6 defendant LEONARD admits in his pleading has been repeatedly
7 briefed and argued to the Court, and which the Court soundly
8 rejected in the Restitution Order. Defendant LEONARD's claim of
9 error does not fall within the narrow scope of errors Rule 35 is
10 intended to correct, and his motion should be summarily denied on
11 that basis alone. Nevertheless, defendant LEONARD's alleged
12 error is also without merit. The Court correctly found in the
13 Restitution Order that the government's investigation was
14 adequate in light of the circumstances of this case, and nothing
15 in defendant LEONARD's instant motion undermines this finding.

16 **II. LEGAL STANDARD**

17 Rule 35(a) provides in full:

18 **Correcting clear error.** Within 14 days after
19 sentencing, the court may correct a sentence
20 that resulted from arithmetical, technical,
or other clear error.

21 Fed. R. Crim. P. 35(a). The United States Court of Appeals for

22 _____
23 persistent fight against an order of restitution raises the
24 suspicion that he possesses substantial off-shore assets that he
25 wants to protect from being seized by the government to satisfy
26 any restitution obligations. A defendant would not fight an
27 order of restitution so vociferously if he is essentially
28 penniless, as defendant LEONARD has claimed in the past he is.
See Ex Parte Application for Airfare Payment by defendant LEONARD
(Docket Entry 855) (asserting that defendant LEONARD could not
afford to pay for airfare from Denver, Colorado to Los Angeles,
California to attend the restitution hearing).

the Ninth Circuit has stated that "[t]he district court's authority to correct a sentence under Fed. R. Crim. P. 35(c) [Rule 35(a)]² 'is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence.'" United States v. Portin, 20 F.3d 1028, 1029 (9th Cir. 1994) (per curiam) (quoting Fed. R. Crim. P. 35 advisory committee's notes on 1991 Amendment). The Ninth Circuit has also clearly stated that the purpose of this rule is "to permit the district court to correct 'obvious' sentencing errors, 'but not to reconsider, to change its mind, or to reopen issues previously resolved under the guidelines, where there is no error.'" United States v. Aguirre, 214 F.3d 1122, 1126 (9th Cir. 2000) (quoting Portin, 20 F.3d at 1030).

III. ARGUMENT

A. Defendant LEONARD's asserted "error" is merely an improper attempt to re-litigate issues decided by the Court in the Restitution Order

In his motion, defendant LEONARD asserts that the Court's finding that the government performed the best analysis it could have performed under the circumstances in determining defendant LEONARD's income from the Genesis Fund is erroneous. Defendant LEONARD claims that the government's failure to produce Arnoldo Andre Tinoco, a Costa Rican attorney, for the restitution hearing, or to agree to the defense request for a continuance of the restitution hearing, or to interview Mr. Tinoco regarding

²Rule 35 was amended by Pub. L. No. 98-473. This amendment included, among other things, a renumbering of Rule 35(c) to Rule 35(a).

1 defendant LEONARD's restitution issues deprived defendant LEONARD
2 of the opportunity to meaningfully defend against the
3 government's restitution calculations. Defendant LEONARD states
4 that he continuously argued that the absence of Mr. Tinoco
5 deprived him of the opportunity to defend himself and asked the
6 Court to decline to award the restitution amount sought by the
7 government.

8 The Court addressed this argument by defendant LEONARD in
9 its restitution order and soundly rejected it. Specifically, the
10 Court stated:

11 One of Leonard's primary defenses to the
12 government's restitution calculations is that
13 he did not have access to his co-defendants
14 so he could not effectively counter those
15 calculations. This argument fails. One of
the inherent risks of engaging in a criminal
conspiracy is that you will not be able to
rely on your co-conspirators for your
defense.

16 Restitution Order at 2. Defendant LEONARD's own pleading
17 demonstrates that the claimed error has been litigated
18 extensively in the restitution pleadings. This makes clear that
19 defendant LEONARD's current motion is nothing more than an
20 attempt to re-litigate an issue already decided by the Court and
21 not to correct the sort of error Rule 35(a) was designed to
22 address. Rule 35(a) does not permit a court to reconsider its
23 sentence as defendant LEONARD urges the Court to do here.
24 Accordingly, defendant LEONARD's Motion should be denied.

25 B. Defendant LEONARD's claim that the government failed to
26 meets its burden is utterly without merit.

27 While defendant LEONARD's motion should be denied out of
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1 hand because it is merely an improper attempt to use Rule 35 to
2 re-litigate an issue already decided by the Court, defendant
3 LEONARD's motion is also meritless because nothing defendant
4 LEONARD claims in his motion undermines the Court's finding that
5 the government met its burden in proving the unreported income by
6 defendant LEONARD and his co-defendants.

7 As the Court noted in the Restitution Order, the government
8 used the bank deposits method of proof to calculate the
9 unreported income. Therefore, the government has "an overall
10 burden to prove that it has done the best it can to discover, and
11 exclude, all non-income items from the reconstructed income."
12 United States v. Stone, 770 F.2d 842, 844 (9th Cir. 1985)
13 (quoting United States v. Morse, 491 F.2d 149, 154 (1st Cir.
14 1974)). The government is responsible for investigating
15 "explanations of the defendant reasonably susceptible of being
16 checked." Holland v. United States, 348 U.S. 121, 138 (1955).
17 "But where relevant leads are not forthcoming, the Government is
18 not required to negate every possible source of nontaxable
19 income, a matter peculiarly within the knowledge of the
20 defendant." Id. As noted by the Ninth Circuit, "[t]he adequacy
21 of a bank deposits investigation necessarily turns on its own
22 circumstances." Stone, 770 F.2d at 845 (citation omitted).

23 Defendant LEONARD now claims that the government has somehow
24 failed to meet its burden in proving the unreported taxable
25 income to defendant LEONARD and his co-defendants because the
26 government promised immunity to Mr. Tinoco by letter dated
27 December 8, 2009, interviewed Mr. Tinoco on February 17, 2010 but
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1 did not ask him questions regarding defendant LEONARD's Genesis
2 Fund distributions, and failed to produce Mr. Tinoco for the
3 restitution hearing. Contrary to defendant LEONARD's
4 contentions, the government did meet its burden in proving that
5 it had done its best to discover, and exclude, all non-income
6 items from the reconstructed income, and nothing in defendant
7 LEONARD's instant motion regarding Mr. Tinoco demonstrates
8 otherwise.³

9 Most importantly, Mr. Tinoco cited attorney-client privilege
10 with respect to issues involving defendant LEONARD and his co-
11 defendants. Consequently, during the interview, the government
12 was precluded from asking Mr. Tinoco questions regarding Genesis
13 Fund income received by defendant LEONARD or the other co-

15 ³The government notes that defendant LEONARD makes several
16 statements in his motion that are at odds with his Plea
17 Agreement. For instance, defendant LEONARD states in the motion
18 that Mr. Tinoco confirmed in his interview how he created Costa
19 Rican corporations, foreign trusts, and associated credit cards
20 for use by his clients, "presumably including Mr. Leonard," to
21 hold and protect assets. Def's Mot. at 3. However, no
22 presumption is necessary in this instance as defendant LEONARD
23 admitted in his Plea Agreement that Mr. Tinoco created Costa
24 Rican corporations and related bank accounts for defendant
25 LEONARD. Plea Agreement Appendix A ¶ 21. Similarly, defendant
26 LEONARD states that "[u]nlike the typical taxpayer Mr. Leonard
27 relied completely on Mr. Tinoco to create legal entities to
28 protect Mr. Leonard's assets." Def. Mot. at 7. This seemingly
benign description of defendant LEONARD's use of Mr. Tinoco's
services is contrary to defendant LEONARD's Plea Agreement. In
his Plea Agreement, defendant LEONARD admitted that the Costa
Rican corporations, related bank accounts, and associated credit
cards were established "for the purpose of receiving Genesis Fund
income in order to evade reporting income to the IRS." Plea
Agreement Appendix A ¶ 21. The government concedes defendant
LEONARD's claim that he is not like a typical taxpayer - a
typical taxpayer pays his taxes.

1 defendants. Instead, Mr. Tinoco spoke only in very general terms
2 about services he provided to his clients and certain aspects of
3 Costa Rican corporate and banking law. In addition, as defendant
4 LEONARD correctly states in his motion, the government's
5 interview with Mr. Tinoco focused on co-conspirator Michael
6 Putnam. This is because at the time of the interview, the
7 government had received and presented to Mr. Tinoco a signed
8 waiver of attorney-client privilege from co-conspirator Putnam.

9 Even if Mr. Tinoco could have discussed defendant LEONARD's
10 or his co-defendant's Genesis Fund income, Mr. Tinoco would have
11 been able to provide little to no information regarding the
12 Genesis Fund distributions into their nominee Costa Rican bank
13 accounts. During the February 17, 2010 interview, Mr. Tinoco
14 stated that every month defendant TERESA R. VOGT ("VOGT") came
15 with a list of checks that he needed to sign. Consequently,
16 apart from helping defendant LEONARD and his co-defendants create
17 Costa Rican nominee entities and related bank accounts, Mr.
18 Tinoco's role consisted of primarily signing the checks put in
19 front of him.

20 Defendant LEONARD also claims that the government failed to
21 follow up with Mr. Tinoco regarding the tax consequences in the
22 United States from the actions taken by Mr. Tinoco on behalf of
23 defendant LEONARD and the other defendants. However, Mr. Tinoco
24 stated in the interview that he always advised clients to check
25 with their advisors in the United States and he explained that he
26 only dealt with Costa Rican affairs. Consequently, any
27 questioning regarding U.S. tax consequences resulting from
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1 Genesis Fund distributions to nominee accounts held by defendant
2 LEONARD and the other defendants would have been fruitless.

3 Defendant LEONARD also claims that "because Mr. Tinoco
4 completely controlled whatever income items were attributable to
5 Mr. Leonard, Mr. Leonard, unlike the typical taxpayer, was
6 completely dependent on Mr. Tinoco in assessing whether he had
7 legitimate defenses to some or all of the income items attributed
8 to Mr. Leonard by Revenue Agent Pugh." Def's Mot. at 7.

9 Incredulously, defendant LEONARD wants the Court to believe that
10 he himself did not know the source of the deposits into his own
11 admitted nominee account (created for the purpose of receiving
12 unreported Genesis Fund income), and that the only person who
13 could explain these deposits or offer defenses to the
14 government's assertion that they were indeed unreported Genesis
15 Fund income was Mr. Tinoco. It would be contrary to reason to
16 conclude that defendant LEONARD himself did not know the nature
17 of the deposits into his own nominee accounts. Moreover, Mr.
18 Tinoco's statements during the interview, in which he stated that
19 essentially defendant VOGT came to him with checks to sign, shows
20 that Mr. Tinoco was not familiar with the details of the deposits
21 into defendant LEONARD's accounts. Consequently, this claim by
22 defendant LEONARD that he was completely dependent on Mr. Tinoco
23 to prepare his defense to the restitution calculations is not
24 credible and should be rejected by the Court.

25 Lastly, defendant LEONARD's assertion that the government's
26 failure to produce Mr. Tinoco for the restitution hearing, or
27 interview Mr. Tinoco regarding defendant LEONARD's restitution
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1 issues somehow "deprived Mr. Leonard of the opportunity to
2 meaningfully defend against the government's restitution
3 calculations" is preposterous. Defendant LEONARD cites no
4 authority, nor could he, for the proposition that it is the
5 government's responsibility to call witnesses or gather evidence
6 in order to permit a defendant to present his own version of
7 events. Defendant LEONARD was given extensive opportunity to
8 prepare and present a defense against the government's
9 restitution calculations. Defendant LEONARD, if he wanted, could
10 have moved for depositions of Mr. Tinoco pursuant to Federal Rule
11 of Criminal Procedure 15. He chose not to do so. In addition,
12 defendant LEONARD presumably chose not to subpoena defendant VOGT
13 to testify regarding the Genesis Fund deposits attributed to him
14 as income because, in her proffer, defendant VOGT stated that
15 defendant LEONARD received even more money than the government
16 attributed to him.

17 While defendant LEONARD argues that Mr. Tinoco would have
18 been able to help him prepare a defense to the government's
19 restitution calculations, in fact, Mr. Tinoco's interview
20 provides further support for the government's restitution
21 calculations. Mr. Tinoco stated that the person with the most
22 knowledge regarding the Genesis Fund was defendant VOGT. He also
23 stated that defendant VOGT prepared the monthly statements and
24 mailed them to the Genesis Fund investors. These statements by
25 Mr. Tinoco demonstrate that defendant VOGT was the most qualified
26 individual to describe the income received by defendant LEONARD
27 and the other defendants from the Genesis Fund. The government
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1 spoke with defendant VOGT regarding the unreported Genesis Fund
2 income received by defendant LEONARD and others. Statements made
3 by her and evidence she provided to the government support the
4 government's calculations of unreported Genesis Fund income.

5 As noted above, in using the bank deposits method, the
6 government is not required to negate every possible source of
7 nontaxable income, a matter peculiarly within the knowledge of
8 the defendant. Because defendant LEONARD and others used
9 numerous off-shore nominee entities, the government is
10 understandably hampered in its efforts to reconstruct with
11 absolute certainty the amount of unreported Genesis Fund income
12 received by the defendants in this case. Defendant LEONARD would
13 have the Court disregard his guilty plea, ignore the factual
14 basis in his plea agreement, and require the government to prove
15 beyond any doubt the source of the deposits to his nominee bank
16 account opened for the express purpose of evading income taxes.
17 Absolute certainty, however, is not the standard the government
18 is required to meet and the courts have stated that "the adequacy
19 of a bank deposits investigation necessarily turns on its own
20 circumstances." Stone, 770 F.2d at 845 (citation omitted).
21 Here, the government relied on bank records for accounts
22 defendant LEONARD admitted he created for the purpose of
23 receiving Genesis Fund distributions, along with corroboration
24 from defendant VOGT, the primary Genesis Fund administrator. The
25 Court has already found that, under the circumstances of this
26 case, the government has met its burden to prove that it has done
27 the best it can to discover, and exclude, all non-income items

1 from the reconstructed income. Nothing in defendant LEONARD's
2 instant motion undermines that finding.

3 **IV. CONCLUSION**

4 For all the foregoing reasons, defendant LEONARD's motion
5 for reconsideration should be denied.

6 Date: May 12, 2010

Respectfully Submitted,

8 JOHN A. DiCICCO
Acting Assistant Attorney General

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